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Case and Comment

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Philadelphia Revisited

By OWEN J. ROBERTS

Former Justice, United States Supreme Court

Condensed from The Shingle, March, 1946

Photo by Harris & Ewing

It is good to be home; to return to the place of one's early struggles at the bar; to consort again with the professional companions of one's early days; to refurbish the memories of battles lost and battles won on one's native heath; to clasp hands with colleagues and antagonists worthy, long ago and now, of one's admiration and trust; to go on for the little span that remains in the old company whose place none can fill. These are the joys that accrue to the wanderer who comes back to rejoin his brethren of the Philadelphia bar.

Fifteen years is a large portion of adult life. A homecoming after an absence of that duration naturally stimulates comparison of that which was with that which is. The returned professional man is curious about the changes that may have taken place in the practice of his profession during his absence. I suppose a Philadelphian would expect more of continuity and less of change in his native city than is evident elsewhere. I am glad to say that, in many respects, that expectation has, in my case, not been vain. I find that the old *esprit*, the comradeship, the friendliness and the understanding which has prevailed time out of mind at the Philadelphia bar is in full vigor now, as it was when I went to another field of activity. But, in spite of its traditions and its ancient customs, the bar has in these last 15 years witnessed striking changes in the nature of its work. I see, every day, evidences of the alteration that less than a generation has wrought in the character and scope of the work of the "general" practitioner.

It is evident that he is now devoting less time to private litigation and far more to public law than was the case in 1930. His client now has more questions touching his relations to government than formerly. The complicated tax systems of State and Federal Government raise myriad questions vital to a client's business. A correct answer to some of these may mean the difference betwen business success and bankruptcy. Regulations of the conduct of business of every sort must be known and their mandate observed in order not to court punishment or perhaps disaster. A great part of every practice now consists of applications to, and appearances and trials before, administrative bodies. All this requires not only a familiarity with laws and regulations, but a novel trial technique, quite unfamiliar to the members of the profession of an earlier day. The courts seem less busy, the administrative agencies far more busy than when I left Philadelphia in 1930.

These developments seem to me to have fostered another trend—that towards larger units in the shape of law offices having members who devote themselves more especially to one limited field. I suppose it is inevitable that as in business and other professions, specialization is on the increase. The general practitioner is no doubt now coming to be classified somewhat as the family doctor, in contrast to those of the profession who limit their activities to an intenser concentration within a particular field.

These observations are not intended as critical of the new development in the incidence and administration of the law. I hope, though I confess to being an antique, I am not *laudator temporis actae*. I only know that when I was in the thick of the battle years ago, there was a zest and a joy about the lawyer's life that I miss, as I hear my younger brethren discuss their experiences with this or that governmental administrator or agency. And I wonder whether they and their practice have changed for the better with these changing times. Maybe as much satisfaction comes from being a tax lawyer or a labor lawyer or an Interstate Commerce Commission lawyer or a Securities and Exchange Commission lawyer or a Federal Trade Commission lawyer, *et id omne genus*, as from being an old-fashioned jury lawyer, or chancery lawyer or advocate in appellate courts, but I "hae me doots." I'm old enough to be indulged in obstinacy, and I obstinately maintain that there used to be more fun in practicing law than there is today. Many will say, this is evidence merely that I'm old. So be it.

At all events, I'm glad to be back home among my old

friends and companions of the bench and bar in the atmosphere of professional standards and professional friendship for which our bar stands preëminent.

Ejusdem Generis

An example of the split infinitive carried to the Nth degree
Ex parte John Hill, 3 Carrington & Payne's Reports 225

A certain John Hill was charged with bull-beating, which was alleged to be contrary to a statute setting a penalty when "any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle." Hill contended that a bull was not within the provisions of the statute. It was shown that a statute which mentioned "deans and chapters, parsons and vicars and all other persons whatsoever having spiritual promotion," did not apply to the Archbishop of Canterbury, as the words did not apply to bishops, a superior order. Therefore in this case it was contended since "the enumeration began with ox, cow and heifer, omitting bull, and concluded with other cattle, it did not include a bull, the bull and the bishop standing in pari statu with reference to the words of those statutes respectively." The judge accepts this argument. "Horse, mare and gelding are one class; ox, cow, heifer and steer are another class; and in my opinion the bull is not included in this act of Parliament."

Minnesota Bar Journal, April 1946

Simplified Spelling

Too many wurds in the Inglish langwige are spelled diffruntly from the way they are pronownsed. There hav bin sum faint-harted attempts to improov the situayshun but they don't get very far. It isn't only the spelling; it's also the way wurds are uzed. If you say freez and froz, why shuldn't you say squeez and squoz? And if it's mowse and mise why not say hows and hise? A wurd such as "cough" really ort to be spelled koff, and if there's enything to the ideer that usage gives authoraty, then "government" should long hav becum guvvermunt. Speeking in general turms, we are in fayvor of a spelling sistem that maches the ufonistic ellements of our muther tung.

Tax Topics

TITLE EXAMINER'S NIGHTMARE

Attorney James A. Alexander, of Jackson, Mississippi, contributes this opinion which, while it may be fictitious, is packed full of interest.

"I HAVE examined the abstract of title in seven parts covering the land in South 236½ acres of the Edmonson Survey in—County, Missouri, which you are preparing to buy, and herewith render my opinion;—to wit

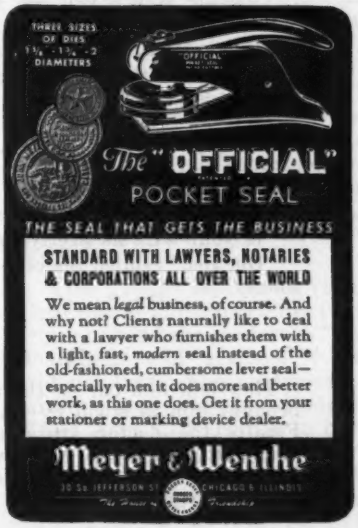
"Don't buy the G—— D—— land. It has been my sorrow and burden to look over several horrible examples of title examiners' nightmares, but this alleged title takes the cutglass flyswatter. It is my private belief that you couldn't cure the defects in this title if you sued everybody from the Spanish Government (who started this mess) on down to the present possessor of the land, who is there by virtue of a peculiar instrument optimistically designated by the abstractor as a "General Warranty Deed."

"In the first place, the field notes of the Spanish Grant do not close; I do not think it possible to obtain a confirmation grant since the last unpleasantness in 1898. In the second place, there were nineteen heirs of the original grantee, and only three of them joined in the execution of the conveyance unto the next party in this very rusty chain of title, which is a major defect in the first place. We might rely on limitation here, except that I am reliably informed that nobody has succeeded in living on this land for a period of two years before dying of malnutrition. Laches might help out, but anybody who undertakes to buy land under a title acquired by laches is setting out like the man who set out to carry the cat home by the tail—he is going to acquire experience that will be of great value to him and never grow dim or doubtful.

"The land has been sold for taxes eight times in the last forty years. The last purchaser sued the tax collector a month after he bought it for cancelation of the sale on the grounds of fraud and misrepresentation. He doubtless had grounds, but this incident will give you a rough idea of what kind of muzzle-loading smoothbores have been fritzing this title. Nobody has ever redeemed one of these tax sales—glad to get rid of it no doubt.

"On Jan. 1st, 1905, a gentleman, who appears suddenly out of nowhere, by the name of Ellis Gretzberg, executed a quitclaim deed, containing a general warranty of title (?) to one Peter Parkinson. Parkinson, the prolific old goat, dies, leaving two wives and seventeen children, the legitimacy of two of them being severely contested. I am not being funnier than the circumstances indicate. He actually left two wives and it appears never to have been legally adjudicated who he done wrong by. Each one of the ladies passed away in the Fear of God and the hope of a Glorious Resurrection and left a will devising this land to her respective brats. A shooting match between two sets of claimants seems to have assisted the title slightly by reducing their number to six and substituting eleven sets of descendants. One of the prevalent causes of defect in this title seems to be the amorous proclivities and utter disregard of consequences prevailing in this neighborhood.

"Your prospective vendor derives title by virtue of an instrument concerning which I have previously remarked. It is executed by a fair majority of one set of the offsprings of Peter (Prolific) Parkinson, and is acknowledged in a manner sufficient to pass a county clerk with his fee prepaid. Outside of the fact that it does not exactly describe the property under search,



the habendum clause is unto the grantors, the covenant of general warranty does not warrant a thing and it is acknowledged before it is dated, I suppose it is all right.

"I might mention that this land was subject to trespass to try title suit between two parties who appear in the abstract for the first time and one of them recovered judgment awarding title and possession. We may waive this as a minor defect, comparatively speaking.

"I would advise you to keep the abstracts if you can. It is a speaking testimonial to the results of a notary public drawing instruments, county clerks who would put a menu on record if a fee was tendered, and jack-legged jug-heads posing as lawyers.

"You can buy the land if you wish. There are at least five hundred and seventy-three people who can give you as good title as your prospective vendor, not counting the heirs of the illegitimate son of Prather Linkin who died in the penitentiary in 1889."

Winning the Argument

Lawyer: How'd you get along with your wife in that fight over that bridge hand the other night?

Answer: Oh, she came crawling to me on her knees.

Lawyer: Is that so? What did she say?

Answer: Come out from under that bed, you coward!

Make Up Time

Two lawyers who hadn't seen each other for fifteen years met and began reminiscing.

"Is your wife as pretty as she used to be?" asked one.

"Oh, yes," replied the other, "but it takes her quite a bit longer."

Pequanoc Pow-wow.

The Guilty Cop

They laid him out on the police floor, and the cop who brought him in stood by while the doctor examined him. Finally the doctor arose and said, "That man's been drugged." The cop went white and shivered. "That's right, sir. It's my fault. I drug him 6 blocks."

Alabama Baptist.

JOHN BOWNE OF FLUSHING

by

EDWIN ARTHUR HALL

Congressman from New York

Condensed from Liberty, First Quarter, 1946]

A CHARTER of October 10, 1645, issued by Governor William Kieft of the Dutch province of New Netherland, promised the founders of Flushing (New York) "the right to have and enjoy liberty of conscience."

Within two months after the conclusion of the war with the Indians, patents for the land of Vlissingen, later known as Flushing, were granted by Governor Kieft to eighteen persons. All but one of these were English. This land is said to have originally been bought from the Indians by the Dutch for one hoe for each fifty acres.

Under the Gravesend charter, they were not only to have "free liberty of conscience," but they had the right to worship "without molestation or disturbance from any magistrate or magistrates or any other ecclesiastical minister that may pretend to jurisdiction over them."

Governor Kieft was succeeded by Governor Peter Stuyvesant, who had a particular dislike for the Quakers.

At the age of twenty-two John Bowne came to the New World from Derbyshire, England, with his father, Thomas Bowne. In England, a few years earlier, a twenty-year-old lad named George Fox had been telling his friends that "man became in very truth the Temple of God; he cannot be borne in sin, and needs neither priest nor ritual to restore him from sin or to bring him into communication with his loving Creator."

His friends accepted the idea, and soon the young man was preaching about it. His followers were later referred to as Quakers. In 1657 eleven Quaker preachers were among the passengers on the ship *Woodhouse* when it sailed for Boston. The ship strayed from its course and eventually sailed into Long Island Sound. Five of the preachers remained at New York.

The group visited Governor Stuyvesant and reportedly found him at that time moderate "both in words and actions." That did not last. The leader of the group was Robert Hodgson. They went to Flushing to carry on their ministerial efforts. Hodgson was arrested for his preaching, thrown into prison,

and ordered to pay a heavy fine. When he refused to pay, he was publicly flogged and was banished from the province after Stuyvesant's sister intervened.

This action on the part of Stuyvesant, who is said to have been prodded by Thomas Willett, only brought more converts to the Quaker cause in Flushing. This irked the governor to the point of violating the earlier charter by issuing an edict against harboring Quakers.

His edict brought the now-famous Flushing Remonstrance. Twenty-eight freeholders of Flushing and two from near-by Jamaica penned their signatures to this document of freedom which had been written by Edward Heart, town clerk of Flushing. It was carried to the governor by Tobias Feake, the sheriff. The remonstrators declared that in Holland the "law of love, peace, and liberty" was even extended to "Turks, and Egyptians," and they therefore could not condemn the people called Quakers.

The Flushing Remonstrance vexed the governor, and his first act was to order the arrest of Town Clerk Heart and Sheriff Feake and two other signers. The clerk got off with payment of costs in his case, and the sheriff was ousted from office and given his choice of paying a fine or going into banishment. To top it off, the governor declared a fast day so that the people might throw off what he called "the new, unheard-of, and abominable heresy."

In 1661 Stuyvesant became so embittered at the progress being made by the Flushing Quakers that he issued another edict—more rigid than the former, and in it he ordained that there should be no public exercise of religion except the established religion (Dutch). This prompted Bowne to invite the Quakers to meet in his home. He was arrested and fined 25 pounds (Flemish) after having been found guilty.

Bowne refused to pay the fine. This brought for him a term in

the dungeon with bread and water as his diet. One writer reports that he was kept there for four months, during which time "the door was frequently left open, the authorities hoping he would escape and leave the colony."

Stuyvesant decided to "make an example" of Bowne, and he ordered him sent to the headquarters of the West India Company in Holland for trial.

In an attempt to "cushion" the case the directors handed Bowne a paper to sign. In reply Bowne wrote his own answer, which parallels Patrick Henry's famous "Give me liberty, or give me death" speech. He said:

"Friends, the paper drawn up for me to subscribe I have perused and weighed, and do find the same not according to that engagement to me through one of your members, viz.: that he or you would do therein by me as you would be done unto, and not otherwise. But, truly, I cannot think that you did in sober earnest ever think I would subscribe to any such thing, it being the very thing for which I rather chose freely to suffer want of the company of my dear wife and children, imprisonment of my person, the ruin of my estate in my absence there, and the loss of my goods here, than to yield or consent to such an unreasonable thing as you hereby would enjoin me unto."

Bowne was eventually acquitted, and the directors at Amsterdam sent Stuyvesant the following decision:

"We, finally, did see from your last letter, that you had exiled and transported hither a certain Quaker named John Bowne, and although it is our cordial desire that similar and other sectarians might not be found there, yet as the contrary seems to be the case, we doubt very much if rigorous proceedings against them ought not to be discontinued except you intend to check and destroy your population, which, however, in the youth of your existence, ought rather to be encouraged by all possible means. Wherefore it is our opinion that some connivance would be useful that the consciences of men, at least, ought ever to remain free and unshackled. Let every one be unmolested as long as he is modest, as long as his conduct in a political sense is unimpeachable, as long as he does not disturb others or oppose the government. This maxim of moderation has always been the guide of the magistrates of the Netherlands, and the consequence has been that from every land people have flocked to this asylum. Tread thus in their steps, and we doubt not you will be blessed."

From Commercial Law Journal,
March, 1946

Abraham Lincoln and Commercial Law—Returning Claims

By HENRY C. FRIEND
of the Wisconsin Bar

ABRAHAM LINCOLN was actively engaged in commercial practice. Because he was interested in politics, and was often absent from Springfield while trying cases in other counties, he was not always in position to make reports as promptly as his clients wished. He was also handicapped by an inadequate filing system.

"In a letter to a fellow lawyer in another town, apologizing for failure to answer sooner, he explains: 'First, I have been very busy in the United States Court; second, when I received the letter I put it in my old hat and buying a new one the next day the old one was set aside, and so the letter was lost sight of for a time.' This hat of Lincoln's—a silk plug—was an extraordinary receptacle. It was his desk and memorandum-book. In it he carried his bank book and the bulk of his letters. Whenever in his reading or researches he wished to preserve an idea, he jotted it down on an envelope or stray piece of paper and placed it inside the lining. Afterwards when the memorandum was needed there was only one place to look for it.

"Lincoln had always on the top of our desk a bundle of papers into which he slipped anything he wished to keep and afterwards refer to. It was a receptacle of general information. Some years ago, on removing the furniture from the office, I took down the bundle and blew from the top the liberal coat of dust that had accumulated thereon. Immediately underneath the string was a slip bearing this endorsement, in his hand: 'When you can't find it anywhere else, look in this.' "[1]

Accordingly Lincoln sometimes was criticized by his clients, particularly those who resided at a distance from Springfield. Lincoln met this situation resolutely and diplomatically.

"In 1842 he wrote Joshua Speed: 'I wish you would learn of Everett what he would take, over and above a discharge, for all trouble we have been at to take his business out of our hands and give it to somebody else. It is impossible to collect money on that or any other claim here, now, and although you know I am not a very petulant man, I declare that I am almost out of patience with Mr. Everett's endless importunities. It seems like he not only writes all the letters he can himself, but he gets everybody else in Louisville and vicinity to be constantly writing to us about his claim. I have always said that Mr. Everett is a very clever fellow, and I am very sorry he cannot be obliged; but it does seem to me he ought to know we are interested to collect his claim, and therefore would do it if we could. I am neither joking nor in a pet when I say we would thank him to transfer his business to some other,

[1] Herndon's Life of Lincoln, Angle's ed. pp. 253–4. Published by Albert & Charles Boni, Inc. The letter is set forth in full in Uncollected Letters of Abraham Lincoln—Gilbert A. Tracy (1917) pp. 42–3. Published by Houghton Mifflin Company.

without any compensation for what we have done, provided he will see the court costs paid for which we are security.' "[2]

S. C. Davis and Company were wholesale merchants located at St. Louis, Missouri. They did a large business in Illinois, and employed Lincoln and Herndon to collect, through the United States Court, their bad accounts in the central and southern parts of the state.

"Springfield, Nov. 17, 1858

"Messrs. S. C. Davis & Co.

Gentlemen

"You perhaps need not to be reminded how I have been personally engaged the last three or four months. Your letter to Lincoln & Herndon, of Oct. 1st complaining that the lands of those against whom we obtained judgments last winter for you, have not been sold on execution has just been handed to me today. I will try to 'explain how our' (your) 'interests have been so much neglected,' as you choose to express it. After those judgments were obtained we wrote you that under our law, the selling of land on execution is a delicate and dangerous matter; that it could not be done safely, without a careful examination of titles, and also of the *value* of the property. Our letters to you will show this. To do this would require a canvass of half the State. We were puzzled, & you sent no definite instructions. At length we employed a young man to visit all the localities, and make as accurate a re-

[2] Herndon's Life of Lincoln, Ch. 10, Angle's ed., p. 252. Published by Albert & Charles Boni, Inc. This letter which was dated March 27, 1842 is set forth in full in the Complete Works of Abraham Lincoln by John G. Nicolay and John Hay, 1905 ed., Volume 1 at page 214. Published by D. Appleton-Century Company, Inc.

port on titles and values as he could. He did this, expending three or four weeks time, and as he said, over a hundred dollars of his own money in doing so. When this was done we wrote you, asking if we should sell and bid in for you in accordance with this information. This letter you never answered.

"My mind is made up. I will have no more to do with this class of business. I can do business in Court, but I cannot, and will not, follow executions all over the world. The young man who collected the information for us is an active young lawyer living at Carrolton, Greene County, I think. We promised him a share of the compensation we should ultimately receive. He must be somehow paid; and I believe you would do well to turn the whole business over to him. I believe we have had, of legal fees, which you are to recover back from the defendants, one hundred dollars. I would not go through the same labor and vexation again for five hundred; still, if you will clear us of Mr. William Fishback (such is his name) we will be most happy to surrender to him, or to any other person you may name."

Yours &c
A. Lincoln"[3]

William Meade Fishback was a young lawyer who had come to Illinois from Richmond, Virginia, in the early part of 1858. By the time this letter was written, however, he had removed to Arkansas.

"Springfield, Dec. 19, 1858

"Wm. Fishback, Esq.

My Dear Sir:

"Yours of the 1st to C. M. Smith has been handed me to answer. Soon after the political campaign closed here Messrs. S. C. Davis & Co. wrote me rather complaining that lands had not been sold upon their executions. I answered them, saying it was their own fault, as they never answered after we informed them of the work you had done. I also informed them that in the future we would not follow executions, and requested them to pay you for what you have already done, and transfer all the business in our hands to you. They replied they would do so; but by that time we had learned that you were gone. Very reluctantly I had to write them that you were gone, and that we must renew our effort to collect the money on their executions. And so we have pitched into it again. To my regret I find that I have either lost one of your letters, or your researches did not go so far as I thought. I find nothing about the case at Browning in Schuyler County.

"We drew on S. C. Davis & Co. for $100 and sent you the proceeds.

"Unless your prospects are flattering where you are, or your health will not permit, I wish you would return and take charge of this business. With the general chances of a young man, and additional business of the same sort which we could from time (to time) put in your hands, I feel confident you could make a living."

Yours very truly
A. Lincoln"

Fishback remained in Arkansas, and later became Governor of that State. Lincoln and Herndon continued to represent S. C. Davis and Company.[4]

"Springfield, Ills., June 21, 1859

"Charles Ambos, Esq.,

"Dear Sir: I have had two or three letters from you recently in regard to the claim of your Company against

[3] *New Letters and Papers of Lincoln, by Paul M. Angle,* 1930 *ed., pp.* 199–200. Published by Houghton Mifflin Company.

[4] *New Letters and Papers of Lincoln, by Paul M. Angle,* 1930 *ed., pp.* 200–01. Published by Houghton Mifflin Company.

T. A. Barret. Mr. Barret has been telling me for the month past that there is some money at Christian Co. of the claim assigned to your company as security which can be had when he and I can go there together to release a portion of the land involved; but I have been unable to get off at any time when I could (get) Barret to go with me.

"I now think I will get off in a few days. It is so very much better to get the debt reduced by actual payments than to push forward in sole reliance upon the law, that I am loth to lost any opportunity of this sort.

"I would now very gladly surrender the charge of the case to any one you would designate, without charging anything for the much trouble I have already had."

Yours & c
A. Lincoln"[5]

In the first instance Lincoln made use of his friend, Joshua F. Speed to act as an intermediary in approaching his client; in the others, he wrote to the clients directly. In each case, Lincoln referred to the services which he had performed and offered to return the claim. In two cases he asked to be reimbursed for the expense which he had advanced or toward which he had pledged his credit. In one instance he was able to point out that his client was at fault in failing to answer his inquiry for instructions.

If Lincoln had disregarded his clients' inquiries or had simply returned these claims, his professional reputation for care and diligence might have been questioned. By writing as he did, Lincoln almost put his indignant clients in the wrong, and in one instance at least, retained a valuable connection. Lincoln's commercial practice undoubtedly contributed to the development of his extraordinary skill as a draftsman.

[5] *Uncollected Letters of Abraham Lincoln, Gilbert A. Tracy*, 1917 *ed.*, p. 110. Published by Houghton Mifflin Company.

A Lincoln Story

When Lincoln was a young lawyer in Illinois, he and a certain judge got to bantering about trading horses. It was agreed that they should make a trade, the horses to be unseen up to that hour.

A crowd gathered at the appointed time. The judge appeared first, leading or dragging a bony, ribstaring quadruped—blind in both eyes. There was uproarious laughter. Presently, Lincoln came along, carrying over his shoulder a carpenter's horse. He solemnly set the horse down, silently surveyed the judge's animal, and said, "Well, Judge, this is the first time I ever got the worst of it in a horse trade."

A. K. McClure.

Marriages by Proxy in Mexico

by WILLIAM B. STERN • Foreign Law Librarian, Los Angeles County Law Library • Condensed from Southern California Law Review, December, 1945

Marriage by Proxy during Colonial Times

ACCORDING to the Recopilación de Leyes de los Reinos de las Indias, the famous Siete Partidas which provide for marriage by proxy had the force of law in Mexico. In the Siete Partidas we find:

> "Matrimony can be contracted by the parties themselves, who are to marry, or by their relatives, or by messengers from their families, or by other strangers acting under their direction, and it should be done openly and not secretly, so that it can be proved."

This text would seem to permit marriages by proxy without any restriction. Limitations, however, are found in the law of the Catholic church, whose officers were in charge of performing the marriage ceremony. The Third Mexican Provincial Council of 1585 established the rule that only the "proper pastor" (*proprius parochus*) or a pastor who has been delegated by him (*de ejusdem licentia*) may witness the marriage. The proper pastor is that of the domicil of at least one of the spouses, except in the case of vagabonds, and it is his duty to make the preliminary investigation as to baptism and other prerequisites of marriage. This rule was given legislative force by the Recopilación de Leyes de Indias, and was actually based on the Decree *Tametsi* of the Council of Trent where it is stated that:

> "Those who shall attempt to contract marriage otherwise than in the presence of the parish priest or of another priest authorized by the parish priest or by the ordinary . . . the holy council renders absolutely incapable of thus contracting marriage and declares such contracts invalid and null, as by the present decree it invalidates and annuls them."

It is well known that the Decree *Tametsi* led to numerous practical difficulties and finally was superseded by the *Ne Temere* law of 1908; but the Codex Iuris Canonici upheld the rule that only the pastor or ordinary (bishop, *et cetera*) or the domicile of at least one of the parties, or their

delegate, may perform a marriage by proxy.

So it appears that, during the Colonial times of Mexico, marriages by proxy were permissive if concluded before the domiciliary pastor or his delegate.

The Reform Period

In the Constitution of 1857, the separation of Church and State provided the main theme. Ecclesiastical courts lost their importance; and in Article 123 the way was left open for anti-clerical legislation.

The constitutional authorization was soon translated into practice by the Ley de Matrimonio Civil of July 23, 1859 and the Ley Organica del Registro Civil of July 28 of the same year. Under the first law,

> "Marriage is a civil contract which is lawfully and validly concluded before the civil authority. For its validity, it is sufficient that after compliance with the formalities which are established by this law the parties appear before the civil authority and freely express their desire to consider themselves united in matrimony."

and

> "Persons who intend to contract matrimony appear in order to declare their desire, before the officer of the civil register in the place of their residence."

The application is followed by the publication of banns at the domicile of the applicant. The

record in the Civil Register is full proof of the marriage.

Did the laws of 1859 change the substantive rules concerning marriage by proxy? The primary purpose of both laws was the outward separation of Church and State. In a Circular of the Secretaria de Estado y del Despacho de Gobernacion, the importance of the laws was compared to that of the decrees of the Council of Trent. By the latter, the Catholic church had assumed jurisdiction in matters of personal status. By the Mexican laws, the authorities of the Government were to keep records of birth, marriage and death, and were to supervise compliance with laws which had their basis in the consent of the people rather than in the command of the Church.

The Restoration Period

The clerical issue was decided on paper only. In fact, it involved the country in political turbulence from which it was not soon to emerge. The Restoration Period, which centered around the tragic efforts of Emperor Maximilian, and aimed at quieting the nerves of the country, merely brought that moment of rest which follows the impact of shock. While the government did not have full control over the country, it busied itself with law reform. Search for order and security pointed toward the Nineteenth Century's remedy: Codification.

In 1857, President Juarez asked Dr. Justo Sierra to form the draft of a civil code. According to Luis Méndez, Sierra and Perfecto Solis retired "with their books" into the solitude of a monastery, and, after two years' work, delivered the draft of the code to the government in 1859 and 1860. Sierra died shortly afterwards as a result of his too strenuous attention to work. Whatever the basis for Sierra's draft may have been, the conclusion is warranted that he had no intention of incorporating the laws of 1859 in his draft. It was in line with this trend of thought that he did not provide for marriages by proxy. But a Commission which was formed in 1862 for the examination of Sierra's draft amended it so as to include the laws of 1859, and added Article 78, which authorized the entry of a marriage into the Civil Register by proxy, after publication of the banns at the party's domicile. According to Article 70, however, the publication of the banns could be waived in certain instances.

In fact, the inclusion of the proxy rule caused some debate in the meeting of the Commission. F. Ramirez, a member of the Commission, stated

> "that he saw no reason why matrimony should be concluded only in the presence of the parties, as it was always considered possible to do so through an agent, as is decided in Law 5, t. 2, of the Fourth Partida, and has been the practice among us."

Clearly, Ramirez was not aware that he perpetuated a rule of canon law rather than a local custom.

The first two books of the revised Sierra draft were finally enacted in 1866 as the Codigo Civil del Imperio Mexicano. But the Empire came to a tragic end in the following year.

The Codes of 1870 and 1884

A new codification commission took charge and published the revised draft of a Civil Code; the draft was enacted in 1870. Mexico had become a federal state. The 1859 laws and the Emperor's Code were addressed to the country as a whole. The 1870 and all following codes were merely enacted for the Federal District and Territories.

Although the separation of Church and State was accepted in principle, the doctrine of the church survived in many respects. Provisions for marriage by proxy were introduced by Article 132 of the new code. Marriage applications were to be submitted to the domiciliary Judge of the Civil Register and were to be concluded before him. The rules for the publications of banns were literally the same as in the laws of 1859.

The Law on Family Relations of 1917

On January 31, 1917, Mexico adopted a new Constitution. By Article 130, Sec. 3, of the new Constitution, the church was reminded that marriage was a civil contract, and that all incidents of the civil status were to be under the exclusive jurisdiction of civil authorities. Shortly after the adoption of the Constitution, the Law on Family Relations was passed. Already, by Constitutional Law of December 29, 1914, of the Carranza regime in Veracruz, divorce by mutual consent or for serious fault of either spouse was permissive. In the Family Relations Law of 1917, the provisions of the Code of 1884 on separation were expressly superseded by rules on divorce.

Equality of husband and wife was put into effect in a way which went to extremes. The idea of individual liberty had finally triumphed. It may be assumed that proxy marriages remained permissive as a seeming tribute to "individualism." The law provided that marriage applications were to be submitted in person or by duly appointed proxies before the Judge of the Civil Register in whose district at least one of the spouses was domiciled. Publication of banns was abolished; and the marriage was to be concluded in the presence of the parties or duly appointed proxies who held a special power of attorney.

The Civil Code of 1928

The Law of Family Relations of 1917 was adopted by many, though not all, States of the Republic. Similarly the new Civil

Code of 1928, which superseded the law of 1917, is in force in the Federal District and territories, and in many States which have adopted it. In marriage matters, the Civil Code of 1928 follows closely the law of 1917. According to Article 97 of the Code, marriage applications must be submitted in writing to the Officer of the Civil Register in whose district at least one of the spouses is domiciled. There is no express provision for the submission of applications by proxy, but it would seem that Article 97 implicitly authorizes applications by proxy, particularly when considered in connection with Article 44, according to which a proxy may act before the Officer of the Civil Register for a party "who cannot appear in person." At the conclusion of the marriage, the parties may be represented by proxies. Despite the above-mentioned provisions, which tie marriage applications and ceremonies to the domicile of at least one of the parties, many non-domiciliary persons, particularly Americans, have concluded marriages by proxy in certain Mexican States which have adopted the federal law. Disregard of the rules as to domicile is sufficient cause for the annulment of the marriage. In the Code of 1928, *e.g.*, disregard of the above-cited Articles 97 and 102 is enumerated as one of the causes for annulment. However, according to Article 250, cohabitation heals the lack of *solemnidades* in the conclusion of the marriage. If the word *solemnidades* is taken in its most general meaning, as "*acto o ceremonia solemne* or *cada una de las formalidades de un acto solemne*," it might conceivably be argued that the word *solemnidades* includes the application for and conclusion of a marriage before the proper Officer of the Civil Register and that marriages concluded by non-domiciliary parties are not subject to annulment if the parties have lived together as husband and wife after the conclusion of the marriage.

Honest Timber

A timber buyer approached a farmer who had a nice piece of timberland. Being a stormy day, the lumberman did not want to go into the woods, so he asked the farmer the usual questions:

"How large are your trees?"

"Twenty inches in diameter."

"How tall are they?"

"They measure about 40 to 50 feet to the first limb."

"How straight do they stand?"

"Straight? Why, man, they are so straight they lean in the other direction."

Chas. T. Schmieding, Townsend National Weekly.

The Saga of Richard J.S.

By RICHARD J. STEVENS of the Chicago Bar

(Chicago Bar Record, December, 1945)

INSTEAD of giving you a detailed account of my not too numerous activities since the draft board made its grevious mistake, I'm sending the enclosed opus which will give you all the latest of my doing.

I.

This is the tale of One Richard J.S.
A lawyer of outstanding fame
Who left all his cases
And Family's Bright Faces
To take up the Soldiering Game.

II.

In spite of his homework with family at night
And his toil in the Courts by the Day
His draft board refused
To say, "You're Excused!"
But sent him that notice "1-A".

III.

So he kissed his dear wife and his children good bye
He kissed his stenographer too
In fact in his leaving
There was little of grieving
For he kissed every girl that he knew.

IV.

On the duly appointed significant day
Early and bright in the morn
He climbed out of bed
Feeling very unfed
And staggered away most forlorn.

V.

He arrived for his scheduled induction exam
And was told by the Docs, "You can't win."
They counted his toes
Eyes, ears, mouth and nose
And announced, "Private Stevens, you're in!"

VI.

Then they shipped him to Sheridan Fort by the Lake
Gave him shots, tests, and gear by the pecks
Dressed him up in a suit
Khaki colored, but cute
And showed him some movies on sex.

VII.

When the week end came round, he was still at the Fort
So they gave him an overnight pass
He streaked right for his flat
Kiddies, wife and all that
And spent all his "A's" on the gas.

VIII.

But his stay there was short, he went back to the Fort,
And was shipped to a far distant camp
There he sweated by day
And at night froze away
And was cold, tired, hungry, and damp.

IX.

But this diligent twit didn't know when to quit
And on Sunday, a day meant for rest
He threw his slight frame
Round the obstacle game
And alas! His bones crunched at the test.

X.

Now they've got him out flat on a hospital mat
Where life is but one endless bore
So all he can say
In a poetical way
Is, "This sure is one Hell of a War!"

From *The Shingle*, May, 1946

The Trial at NUREMBERG

By ROBERT B. WOLF

THE Nazi big-wigs should have some satisfaction from the predicament of Mr. Justice Jackson's staff at Nuremberg. If they misjudged the number of men and bullets and months it would require for Germany's triumph over the rest of the world, so did Mr. Justice Jackson miscalculate on the number of men and briefs and months for justice's triumph over Germany's fallen leaders. The enterprise was advertised as a three-month tour of duty, and it was on a ninety-day temporary duty status that this Philadelphia lawyer was transferred from shavetail in the infantry to attorney on Jackson's staff late in September 1945.

Originally, the legal staff was to have included eighteen to twenty lawyers, some translators, and a relatively brief trial was contemplated. Nuremberg was to be solely a symbol of justice triumphant. However, the mass of material and the international scope of the enterprise brought an increased consciousness of need for careful analysis and the opportunity to demonstrate international solidarity. Time and again, Mr. Justice Jackson would call us together and tell us that proper presentation of our case—a case not for today's retaliation but for tomorrow's guidance—was of paramount importance. Reasonable speed was desirable, but undue haste, improvident. And so the staff grew from twenty to eighty lawyers; from a few translators and administrative assistants to well over eight hundred, including the tribunal court reporters and translators; from a score of Russian, French, and British legal representatives to foreign staffs totaling another eight hundred and including Czech, Jugoslav, and Polish lawyers. The ninety days have stretched into ninety more, and newspapers report another ninety still to go.

The case was divided by agreement in August 1945 into three main divisions: Crimes against the peace, crimes against humanity, and so-called "war crimes" (in the East and the West). The United States as the moving spirit in the trials, invited Britain, France,

and Russia to participate at Nuremberg, each nation to supply its own personnel, its own facilities (such as autos) and its own supplies. Twenty-four individuals and six organizations were to be tried and each of the Four Powers was to appoint a judge and alternate. That was the situation in the summer of 1945—nobody knew quite who was trying what, and everybody assumed (many so assume today) that the defendants would soon hang.

Jackson divided his staff into several branches, chief of which were Interrogation, Documentation, and Special Projects. He had several prominent lawyers as general associates when I arrived, namely, General Donovan, Sidney Alderman of Washington, D. C., and Telford Taylor, who is now succeeding Jackson as Chief United States Prosecutor. The realm of each was far from clearly defined, and coördination of material between the Documentation and Interrogation groups was practically non-existent in the early preparation period from August until October.

Interrogation was a fascinating job. Under the leadership of Brooklyn's former Special Deputy District Attorney, John H. Amen, it was the duty of this division to interrogate the imprisoned Nazis. All the prisoners and potential witnesses were lodged in the former city jail. In one wing were the more serious offenders kept in solitary confinement, unable to communicate with anyone. At one time, this group numbered over one hundred. The defendants had a twenty-four-hour individual guard in addition to the confinement. The other wing (or witness wing) contained the lesser lights, some of whom were being held just for questioning such as Frau Himmler and her daughter. In the witness wing the prisoners could wander freely about the wing until bedtime.

Amen's group of lawyers and interpreters was assigned a series of eight rooms in the Palace of Justice connecting by a closed passageway to the jail. The entrance for the staff from the other rooms in the Palace of Justice was barred with an armed sentry and admission by special pass only. Here an interrogator (lawyer) and his interpreter and stenographer would question in English the defendants and their henchmen. Needless to say, the prisoners were delighted to ease their solitary confinement by answering questions. My most vivid recollection is of Goering, suave and charming, answering questions (in German) without waiting for the interpreter to translate the English question. And most upsetting was my inability to *feel* the disgust which any thinking man should feel in the presence of the evil which was

proven to have had its inception in Goering.

As the trial opening approached, the case was divided into subject matter, and parceled out to section chiefs—one section was concerned with the economic case, another with the case against humanity, and so on. The United States staff bore approximately eighty percent of the burden, the balance was divided up among the other three powers. Much of our presentation before the tribunal was done by Mr. Alderman; very little except the opening address by Jackson, and most examination of witnesses by John Amen. Each section chief presented part of his aspect of the case, and the situation resembled somewhat a progressive school commencement with each staff member getting his moment on stage. This aspect of the presentation became more pronounced as we devoted a special brief to each individual defendant (with as many individual lawyers from our own staff as there were defendants).

Procedurally, the tribunal operated much like our own Common Pleas Courts. A brief was prepared referring to evidence which was introduced by the presenting attorney as he spoke. Evidence was almost exclusively documentary, including affidavits. These were admitted even though the witness was, in some instances, available, although the tribunal did balk at accepting the affidavit of the former Austrian Chancellor, Kurt van Schussnigg, when he had been somewhat conspicuously present in Nuremberg for the several preceding weeks. The purpose of affidavits was to speed matters. Of course, any lawyer knows the value of live witnesses and we did present, for instance, Dr. Franz Blaha, a prominent Czech physician who had been interned at Dachau. His description of the Dachau horrors and then the dramatic pointing out of several defendants as men he had seen at Dachau, was real motion picture drama.

I would like to describe the method of obtaining defense counsel—our problem was whether to permit Nazis to rep-

"Sir, I'll have you know that I'M conducting this cross-examination."

resent the criminals. Many, especially the Russians, felt it would dignify the Nazis to permit a party member to appear before the Tribunal. Others were concerned over the possible charge of unfairness being leveled against the trial. A list of approved lawyers (non-Nazis) was prepared and submitted to the defendants. Several insisted on former Nazis, not listed. (Von Papen's son, a lawyer, was temporarily released as a prisoner of war to serve for his father.) Other defendants refused to make a choice from the submitted list. A Philadelphian, Dr. Robert M. Kempner of Jackson's staff, who had been Berlin State's Attorney in the early '30's, amplified the list from his own knowledge of prewar German attorneys, and then persuaded some of those listed to take over the representation of the defendants without counsel of their own choosing. The final result was that some defense counsel were Nazis, but most had been Nazi victims or were those who had been obscure and quiet during the rise of Nazidom.

Had I the space, more could be written about the Tribunal, Nuremberg itself, the Germans' attitude. Others will tell, as I have not, of a stupendous job done for future generations—a job which dignifies the Law and lays a solid foundation for international law and individual responsibility for crimes on an international scale.

The Celebrity

"Why are all those cars parked in front of Elmer Hippelhooper's house?"

"He's holding a press conference."

"A press conference! And what about those men with wires and strange-looking gadgets?"

"They're fixing things up for Elmer's arm-chair chat tonight."

"My gosh! What's happened to Elmer?"

"Haven't you heard? He's famous. He's the only man in the country who had nothing to do with the development of the atomic bomb."

Phoenix Flame

Ashes of Roses as Grounds for Divorce

(45 Ohio Law Abstract 243)

HISTORY:—Petition for divorce in the Court of Common Pleas on the ground of gross neglect and extreme cruelty. Defendant answered and raised the defenses of general denial, recrimination, and condonation. Petition dismissed.

By WICKHAM, J. In this contested divorce case the plaintiff, a twenty-five year old farmer seeks a decree from his eighteen year old wife.

He is not a stranger to the court. He was here two years ago and won an uncontested decree against his first wife upon a complaint substantially the same as that upon which he now prays to be restored to the status of eligible bachelorhood.

The substance of the petition charges gross neglect of duty and extreme cruelty. The defendant, answering by guardian ad litem, raises the defenses of general denial, recrimination, and condonation.

Plaintiff testified he suffered much mental pain because defendant kept and wore a wrist watch, diamond ring, and sweater, and played a guitar, all given her before marriage by a former boy friend, a section hand who still waves as he hand-cars by and occasionally stops to buy eggs.

Defendant rejoined by showing plaintiff has lately been too friendly with his first wife, who by the merest coincidence is now seeking to cancel her second case of matrimonial misjudgment by appropriate action in the neighboring county of Franklin.

Plaintiff complains that defendant stuck too close to him, and tagged along with him to the farm where he works, following him into the fields to ride tandem on the implements. Defendant in turn says that plaintiff did not stick close enough to her, and abandoned her when she went to the hospital for the still-birth of their child.

Plaintiff says defendant was dirty in her housekeeping, never emptied the commode, and hung her clothes on the floor. She replied that plaintiff never took a bath, and that the clothes on the floor were his. The sheriff, a frequent business guest at the invitation of various members of the family corroborated that the clothes on the floor were men's

clothes, and plaintiff admitted he did not bathe very frequently, considering it an unsafe practice under the circumstances.

Plaintiff says defendant is a glutton, and that on one occasion she consumed eighteen ears of field corn, an expensive commodity these days. Defendant modestly admitted this Gargantuan feat, explaining it was all in a playful contest with her husband who ate sixteen. The court is inclined to view this victory as no fluke, and to believe defendant had some preliminary training for this effort, as her figure is definitely of the class known in these parts as corn-fed.

Plaintiff says defendant and her mother locked him in the house one day when he was supposed to be at the farm bright and early filling silo, and there he remained imprisoned until the ever obliging sheriff, summoned by his father, came to the rescue. The sheriff says he found plaintiff in the house on the first floor, and that while the doors were locked, the windows were open, and it was an easy step through them to the ground. Plaintiff doubtless would have been better prepared for this emergency if he had ever read Mark Twain's "The Storm on the Erie Canal."

Plaintiff filed his petition in this case September 5, 1945, and eleven days later defendant says she swallowed thirty-eight sleeping pills. Immediately announcing that she was an imminent suicide, she was rushed to the hospital and given a thorough pumping out. Plaintiff says this is just another example of defendant's cruelty, scaring every one and running up hospital bills like that.

Strange as it may seem, there were still more charges and countercharges between these parties, mostly along the same general line. This opinion should not further be burdened by their repetition. It will be sufficient to observe that at the finish, plaintiff was not noticeably in front on the merits.

This court is constrained to doubt that the ashes of this mar-

riage are those of roses. They had better be left uncharacterized. But if a court should take the position that it must grant divorces merely because the parties are irreconcilably estranged, there would practically never be an opportunity to deny a decree, for the plaintiff nearly always claims there is no hope for a reconciliation. This in practice would be permitting the plaintiff to lift himself by his own boot straps, for by merely claiming he will never again live with the defendant under any circumstances whatever, the court would be forced to conclude that the parties would be better off divorced and grant the decree regardless of the causes for the estrangement.

It is clear that this course cannot be followed, and the defendant is entitled to have her legal rights, if not her judgment, respected.

The petition will therefore be dismissed at plaintiff's costs.

Staging a Holdup

It was a dark alley in one of the worst parts of the town three men were waiting. One of them pulled a slouch hat down over his eyes, and said, "D'ya see him?"

Another took a quick peek around the corner. "Yes, here he comes!" he hissed.

The man with the slouch hat picked up a short thick section of pipe. Another took a heavy wrench, and the third grabbed a smaller wrench that was none the less effective in close quarters.

"All right, fellers, let's go," one whispered.

And thus, when the boss got around the corner, he found his three plumbers busily at work.

—*The Montrealer.*

That and More

Binks: "He has his back to the wall and his ear to the ground, his shoulder to the wheel and his nose to the grindstone, his head level and both feet on the ground."

Skinks: "Contortionist?"

Binks: "No—a guy trying to do business with the OPA."

Drove on

"You tell me," said the judge, "that this is the person who knocked you down with his motorcar. Could you swear to the man?"

"I did," returned the complainant, eagerly, "but he only swore back at me and drove on."

Among the New Decisions

Administrative Law — *when State Labor Board bound by court judgment.* Chief Judge Lehman wrote a very important opinion in New York State Labor Relations Board v. Holland Laundry, 294 NY 480, 161 ALR 802, 63 NE2d 68, holding that the right of another union to inquire as to whether an employer was guilty of unfair labor practice in refusing to bargain collectively with it was not precluded under the doctrine of res judicata by reason of a judgment in a strike controversy between an employer and another union. However, as between the employer and the employees the doctrine was held to prevent proceedings before the State Labor Board as to reinstatement where the rights were established by the previous decree and to protect the employer from a charge of unfair labor practice based on acts which were in conformity with an existing valid judgment.

The annotation in 161 ALR 812 discusses the question, "Decree or order between employer and employees, or between employer and labor union, as affecting, under doctrine of res judicata or otherwise, proceeding before or rulings of Labor Relations Board."

Airports — *reasonableness of zoning regulation.* Judge Thomas, of the Florida Supreme Court, in Stengel v. Crandon, 161 ALR 1228, 23 So2d 835, wrote the opinion holding that a county zoning regulation which precludes the use as an airport of lands in a sparsely-settled locality, 2 miles outside the boundary of the nearest municipality, is arbitrary and unreasonable, although the property in question is bordered by two arterial highways and the noise of arriving and departing airplanes will be audible at a distance.

The annotation in 161 ALR 1232 discusses "Zoning regulations as affecting airports and airport sites."

Attorneys' Fees — *provision for in chattel mortgage as applicable to sale in bankruptcy.* The U. S. Court of Appeals for the Second Circuit, opinion by Circuit Judge Chase, held in Re Essential Industries Corp., 161 ALR 968, 150 F2d 326, that a provision of a chattel mortgage empowering the mortgagee, upon the mortgagor's default, to take possession of and sell the mortgaged property, and out of the proceeds to retain the amount of the debt secured "and

all charges touching the same, including counsel fees," does not entitle the mortgagee to payment of his counsel fees upon a sale of the property by the mortgagor's trustee in bankruptcy pursuant to a stipulation that the trustee should take possession and sell the property, retaining any surplus above the mortgage debts secured thereon, and providing for the allowance of counsel fees only "as provided for by said mortgage."

The annotation in 161 ALR 972 discusses "Proceeding in bankruptcy as affecting provision for attorneys' fees in chattel mortgage or other obligation."

Automobiles — *car-pooling arrangement.* A continuation of the division of authority on the question of the status of motorists under "share-a-ride" arrangements appears from the result reached by the Washington Court in Coerver v. Haab, 161 ALR 909, 161 P2d 194. Justice Mallery wrote the opinion holding that the driver was liable for ordinary negligence on the theory that participants in a car-pooling arrangement, under which each took his turn in transporting others in his automobile to and from work, are not the guests of the operator of the car within an automobile guest statute, even though any one of them, when it was his turn to ride, was under no obligation to do so, and might withdraw from the arrangement without future obligation.

The annotation in 161 ALR 917, supplementing an earlier annotation in 146 ALR 640, discusses "Host and guest relationship, within statute or rule regarding liability of driver or operator of motor vehicle for injury to guest, as between parties to 'share-a-ride' arrangement."

Bankruptcy — *loss of right to redeem under farmer-debtor proceeding.* Circuit Judge Johnsen, of the Eighth Circuit, wrote a very clear opinion construing section 75(s)(3) of the Bankruptcy Act in Worley v. Wahlquist, 161 ALR 919, 150 F2d 1007, holding that neither a request of creditors for the sale of a debtor's property at public auction, nor contumacious delinquency on the part of a farmer-debtor in failing to comply with provisions of a rental order in a proceeding under the Bankruptcy Act, defeats his right to redeem for an amount fixed by a new appraisal or valuation.

The annotation in 161 ALR 926 discusses "Farmer-debtor's loss of right to redeem property under section 75(s)(3) of the Bankruptcy Act."

Bankruptcy — *surrender of rights in exempt property.* An able opinion by Circuit Judge L. Hand, of the Second Circuit, in the case of Negin v. Salomon, 161 ALR 1005, 151 F2d 112, holds that the exemption of a bankrupt's interest in a fund

payable by a city employees' retirement system at his death to his estate or appointee is not surrendered to his creditors, so as to pass his interest to his trustee in bankruptcy, by his retention of power to change his designation of the beneficiary or by his effort to secure a creditor by creating a lien on the fund.

The title to an annotation in 161 ALR 1009 accompanying this case is "Transfer or attempted transfer of exempt property by bankrupt as subjecting it to claim of trustee in bankruptcy."

Bills and Notes — *consideration partly a gift.* An interesting question was presented the Minnesota Supreme Court in Re Estate of Hore, 161 ALR 1366, 19 NW2d 783. Judge Peterson wrote the opinion holding that

"If this law firm had parking meters here, they could have retired on my contributions alone!"

where a note is given partly as compensation for services and partly as a gift and there is no evidence to show what part thereof is a gift, the holder is entitled to recover the face of the note.

The annotation in 161 ALR 1372 discusses "Liability on note or other executory obligation, part but not all of the claimed consideration for which was a gift."

Constitutional Law — *covenant discriminating against race.* In Mays v. Burgess, 79 App DC 343, 162 ALR 168, 147 F2d 869, Chief Justice Groner, of the United States Court of Appeals for District of Columbia, wrote the opinion holding a covenant against negro ownership or occupation of realty valid and enforceable in equity by way of injunction.

Supplementing earlier annotations in the series the treatment in 162 ALR 180 collects the recent cases on this subject.

Constitutional Law — *right to collect unemployment compensation contributions from foreign corporation.* The late Chief Justice Stone in International Shoe Co. v. Washington, 161 ALR 1057, 90 L Ed (Adv 109), 66 S Ct 154, wrote the opinion holding that a foreign corporation which systematically and continuously employs a force of salesmen, residents of the state, to canvass for orders therein, may, consistently with due process, be sued in the courts of the state to recover unpaid contributions to the state unemployment compensation fund in respect of such salesmen.

The annotation in 161 ALR 1068 discusses "What amounts to presence of foreign corporation in state, so as to render it liable to action therein to recover unemployment compensation tax."

Constructive Service — *nonresident's ownership of mortgage.* In Buchman v. Smith, 137 NJ Eq 215, 161 ALR 1069, 44 A2d 179, Justice Oliphant wrote an opinion holding that an action to obtain a judgment declaratory of the ownership of mortgages, physically in another state, of lands within the state, by virtue of assignments by way of gifts causa mortis, and to set aside a recorded assignment of such mortgages to nonresident defendants, is one quasi in rem, jurisdiction of which may rest upon constructive service.

The annotation in 161 ALR 1073 discusses "Suit to determine ownership, or protect rights, in respect of instruments not physically within the state but relating to real estate therein as one in rem or quasi in rem, jurisdiction of which may rest upon constructive service."

Corporations — *authority of general manager to acknowledge debt barred by limitations.* In the case of Victory Investment Corp. v. Muskogee Electric T.

Co., 161 ALR 1436, 150 F2d 889, in an opinion by Circuit Judge Bratton, it is held that the general manager of a corporation who for a number of years has exercised complete control and management of its affairs, executing all contracts required for the proper conduct of its business, without repudiation of any of his acts by the corporation, has authority to bind it by a written acknowledgment of its indebtedness, so as to toll the statute of limitations, although no provision is made in the bylaws of the corporation for a general manager, the articles of incorporation provide that the corporation's affairs and business shall be conducted and controlled by its board of directors, and its bylaws provide that all written contracts entered into on behalf of the corporation shall be executed by the president or vice president and attested by the secretary or treasurer.

The annotation in 161 ALR 1443 discusses "Authority of officer or employee of corporation to acknowledge corporate debt, make partial payment or new promise, or do other act which will have effect of tolling or suspending statute of limitations."

Cotenancy — *effect of levy of execution.* Judge Thompson, of the Illinois Supreme Court, wrote the opinion in Van Antwerp v. Horan, 390 Ill 449, 161 ALR 1133, 61 NE2d 358, holding that where the attaching of the lien of a judgment upon the interest of a joint tenant does not sever the joint tenancy and levy of an execution on real estate does not transfer the possession to the sheriff, a levy on the interest of a joint tenant does not convert the tenancy into one in common; and therefore where the execution debtor dies before the property is sold, his joint tenant takes the whole by virtue of survivorship.

The cases on this question are well presented in the annotation in 161 ALR 1139.

Evidence — *presumption.* Judge Groner, of the U. S. Court of Appeals, District of Columbia, wrote an opinion in Capital Transit Co. v. Jackson, 161 ALR 1110, 149 F2d 839, holding that the collision of a streetcar with a truck gives rise to an inference, in an action by an injured streetcar passenger against the streetcar company, of negligence on the part of the streetcar operator sufficient to support the plaintiff's case against a motion for a directed verdict.

Supplementing earlier annotations in the series, the annotation in 161 ALR 1113 discusses "Res ipsa loquitur as applicable to injury to passenger in collision where other vehicle was not within carrier's control."

Fair Labor Standards Act — *dredge employees as seamen.* The United States Court of Appeals, opinion by District Judge

Peters, held in Walling v. Bay State Dredging & Contracting Co., 161 ALR 825, 149 F2d 346, that employees on floating dredges, whose work is essentially connected with excavation rather than navigation, are not seamen within the exception from the operation of the Federal Fair Labor Standards Act of "any person employed as a seaman," even though they live aboard the dredge and when the dredge is being towed from the site of one operation to another, perform duties similar to those performed by mariners on moving vessels.

The annotation in 161 ALR 832 discusses "Who are 'seamen' within exception in Fair Labor Standards Act."

"Darling, this is my client, Mr. Simms. He was caught between a fixed price ceiling and a rising cost floor."

Fair Labor Standards Act — *who employed in professional capacity.* In Stanger v. Vocafilm Corp., 162 ALR 216, 151 F2d 894, Circuit Judge Clark, of the Second Circuit, wrote an opinion holding that persons who, in the preparation of pictures to be projected upon a screen and accompanied by phonographic recording, for the purpose of explaining the construction, operation, and maintenance of certain machines, by retouching photographs, blocking out parts not essential to the purpose, drawing additional or concealed parts, making isometric and schematic drawings, and free-hand drawings, paintings, and cartoons, and who, in doing so, follow explicit instructions as to line and color to which their work must conform, are not employed in a professional capacity so as to be outside the operation of the Federal Fair Labor Standards Act, within the Wage-Hour Administrator's definition of professional work as "predominantly original and creative."

The annotation in 162 ALR 220 discusses "Who are employed in 'professional' capacity within exemption in Fair Labor Standards Act."

Fair Labor Standards Act — *who engaged in "production of goods for commerce."* In Baldwin v. Emigrant Industrial Savings Bank, 161 ALR 1234, 150 F2d 524, Circuit Judge Clark, of the U. S. Circuit Court of Appeals, Second Circuit, wrote a very valuable opinion pointing out under what circumstances advertising agencies, book publishers, persons engaged in handling goods after manufacture, and building maintenance employees of rented buildings, come under the Fair Labor Standards Act.

An annotation in 161 ALR 1237 covers the very timely question, "What activities fall within the term "production of goods for commerce,' as used in the Fair Labor Standards Act."

Fraudulent Conveyances — *purchase of homestead in wife's name.* Circuit Judge Sibley, of the Fifth Circuit of the United States Circuit Court of Appeals, wrote the opinion in Beall v. Pinckney, 161 ALR 1281, 150 F2d 467, holding that a husband will not be deemed to have acted with an intention to hinder, delay, and defraud creditors in paying the consideration for a transfer to his wife of property which he intends to occupy as a family homestead, exempt from the claims of creditors.

The annotation in 161 ALR 1287 discusses "Purchase of homestead as fraud on creditors."

Habeas Corpus — *doctrine of res judicata as precluding second application.* A very interesting criminal law question is discussed in the case and annotation in 161 ALR 1316, 1331. The opinion written by Justice Mag-

ney, of the Minnesota Supreme Court, in State v. Utecht, 161 ALR 1316, 19 NW2d 706, held that in view of the existence of a remedy for a denial of a writ of habeas corpus by way of appeal on which there is a trial de novo in the appellate court, the doctrine of res judicata precludes the consideration of a subsequent application.

The annotation in 161 ALR 1331 discusses "Denial of relief to prisoner on habeas corpus as bar to second application."

Insurance — *assault on passenger as covered by liability policy.* In Green Bus Lines v. Ocean Acci. & G. Corp., 287 NY 309, 162 ALR 241, 39 NE2d 251, Judge Finch, of the New York Court of Appeals, wrote the opinion holding that the coverage of an insurance policy obtained by a bus operator pursuant to the requirements of a statute the purpose of which is to afford protection to passengers, whereby the insurer agreed to pay any sums which the insured might become obligated to pay by reason of the liability imposed by law upon the insured for damages for injuries to persons "resulting from the ownership, operation, maintenance, use, or defective construction of" its busses, is not limited to highway accidents, but includes the liability of the insured to a passenger for personal injuries from an assault by a fellow passenger after the driver, with knowledge of a prolonged disturbance by unruly passengers, failed, upon being appealed to for help, to take any measures to restore order.

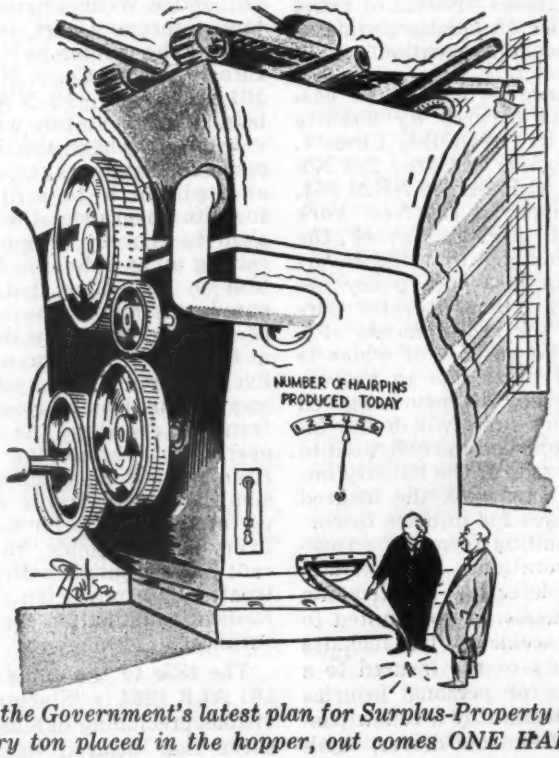
The annotation in 162 ALR 244 discusses the cases under the following title "Assault as within coverage of public liability policy."

Insurance — *estoppel of insurer.* Judge Wennerstrum, of the Iowa Supreme Court, is the author of the opinion in New York Life Insurance Co. v. Hesseling, 161 ALR 1357, 19 NW2d 191, holding that a statute which provides that where the insurer's medical examiner has reported an applicant to be a fit subject for life insurance, the insurer shall be thereby estopped from setting up as a defense to an action on the policy that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the insured, operates to estop the insurer from relying on a policy provision that the insurance shall not go into effect if, prior to the delivery of the policy, the applicant had consulted with or been treated by a physician since his medical examination for the insurance.

The title to the annotation in 161 ALR 1364 is "Statutory provisions precluding defense by insurer that insured was not in

condition of health required by policy at time of issuance and delivery thereof, as applicable to agreement that policy shall not take effect if applicant has consulted or been treated by physician since his medical examination."

Insurance — *extension of term by overpayment of premium.* A close case decided by the West Virginia Supreme Court of Appeals in Poindexter v. Equitable L. Assur. Soc., 161 ALR 990, 34 SE2d 340, opinion by Judge Rose, holds that excess in a premium paid by the insured on a "participating" life insurance policy, through mutual mistake of the insurer and one acting for the insured, in the absence of a provision otherwise



'This is the Government's latest plan for Surplus-Property disposal. For every ton placed in the hopper, out comes ONE HAIRPIN!'

in the policy, creates a simple debt from the insurer to the insured, and the insurer cannot be compelled, upon discovery of the mistake, to treat such excess payment as having purchased additional insurance benefits.

The annotation in 161 ALR 1000 discusses "Excess payment and receipt of life insurance premiums as carrying additional insurance benefits."

Marketable Title — *necessity of showing that property was not homestead or that vendor was unmarried.* The South Dakota Supreme Court in Grand Lodge of A.O.U.W. v. Fischer, 161 ALR 1466, 21 NW2d 213, opinion by Justice Rudolph, holds that a title is rendered unmarketable where it is not shown that a grantor in the chain of title was a single person or that the land was not occupied as a homestead a conveyance of which must be executed by both spouses, even where sufficient time has elapsed to give rise to a presumption that any homestead rights in the property have been abandoned.

The various conflicting views on this question are presented in the annotation in 161 ALR 1472.

Mortgage foreclosure — *limitation of action on debt as affecting foreclosure.* The Wisconsin Supreme Court in First National Bank of Madison v. Kolbeck, 247 Wis 462, 161 ALR 882, 19 NW2d 908, opinion by

Chief Justice Rosenberry, adopts the majority view that the extinguishment of an obligation by the running of the statute of limitations does not prevent the foreclosure of a mortgage given to secure the debt which provides that it may be foreclosed in case of nonpayment, even though the mortgage does not contain any covenant to pay.

A valuable annotation on this question showing both views appears in 161 ALR 886.

Nonprofit Corporation — *dues according to amount of business of members.* A question on which there is a sharp division of authority was decided by the Illinois Supreme Court in Electrical Contractors' Asso. v. Schulman Electric Co., 391 Ill 333, 161 ALR 787, 63 NE2d 392. In a well-reasoned opinion written by Justice Murphy the court took the view that a bylaw of a nonprofit trade association, formed by electrical contractors and dealers, fixing the dues of the members at a stated percentage of the business done by each, is not contrary to public policy, where there is no proof that such percentage was added to contract prices, and the members have no interest in the earnings of the association.

The editor of the annotation in 161 ALR 795 approves the Illinois view as being more in accord with modern business necessity.

Perpetuities — *estoppel to invoke rule.* Justice Stanley, of the Kentucky Court of Appeals, wrote the opinion in Ford v. Yost, 299 Ky 682, 162 ALR 149, 186 SW2d 896, holding that receipt of the income of a testamentary trust to pay over the income for a period of thirty years to testator's son and his children, and at the expiration of that period to turn over the property to the son for life with remainder to his children, does not estop the beneficiaries from questioning the validity of the trust as violating the statute imposing restrictions upon the suspension of the absolute power of alienation.

The annotation in 162 ALR 156 discusses "Estoppel to invoke rule or statute against perpetuities."

Railroad Crossings — *sufficiency of evidence to support verdict.* In a very careful opinion Chief Justice Maxey, in Kindt v. Reading Co., 352 Pa 419, 162 ALR 1, 43 A2d 145, reversed judgments non obstante veredicto on the ground that whether the testimony of persons whose automobile was struck by a train at a crossing with which they were unacquainted and which was not visible from any distance, that, although they were riding in silence, they heard no whistle sounded or bell rung by the approaching train, to the fact of which there was testimony by

the train crew and another railroad employee living in the vicinity, is not so negative in substance that a verdict based thereon may be set aside.

A one hundred and twenty-nine page annotation discusses the many cases dealing with this branch of negative testimony in crossing signal cases. See 162 ALR 9.

Restrictive Covenants — *cost of building.* A practical question is presented in the case of Fritz v. Beem, 161 ALR 1124, 35 SE2d 513, opinion by Justice Duckworth, holding that a building restriction fixing, without reference to the gold content of the dollar, the minimum dollar cost of the building which may be erected on each lot, is satisfied by the erection of a building costing the number of dollars specified, although since the imposition of the restriction the gold content of the dollar has been reduced.

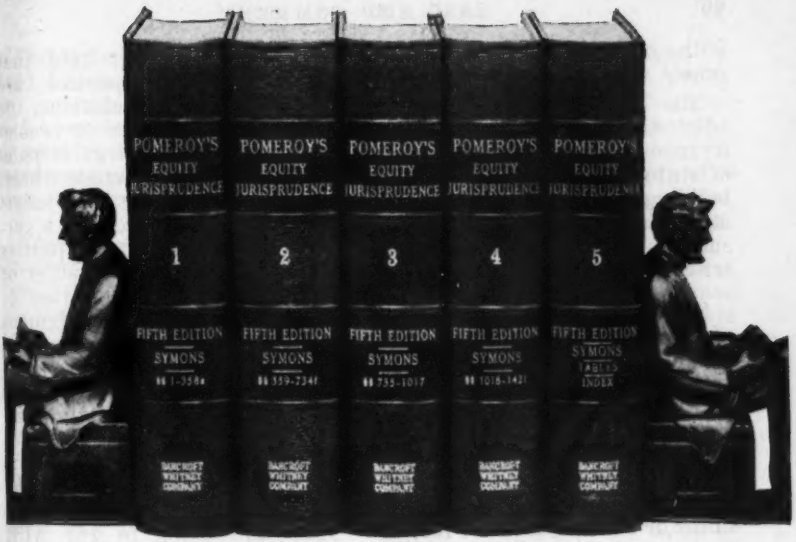
The annotation in 161 ALR 1131 treats the question "Building restrictions specifying minimum cost in dollars as affected by change in gold content or purchasing power of dollar."

School Boards — *right to enjoin breach of contract.* The Texas Supreme Court in Mission Independent School District v. Diserens, 161 ALR 877, 188 SW 2d 568, held that a school district whose contract with a music teacher of extraordinary and unique talents has been broken by her, is, although it cannot obtain a mandatory injunction to compel performance, entitled to an injunction to enforce a covenant in the contract not to teach elsewhere in the state.

The opinion in this case by Justice Simpson is a well-reasoned one.

The annotation on "Governmental body's right to enjoin breach of contract for unique or extraordinary services" appears in 161 ALR 881.

Schools—*right to refuse use of for public meeting.* Judge Traynor, of the California Supreme Court, wrote the opinion of the court in Payroll Guarantee Asso. v. Board of Education, 27 Cal2d Adv 213, 161 ALR 1300, 163 P2d 433, holding that where the right conferred by statute to use public school buildings for public meetings is conditioned on noninterference with their use for educational purposes, a board of education may properly deny the use of a school auditorium for a mass meeting at which a certain person is to be a speaker, where it appears reasonable to suppose that the proposed speaker will arouse so much organized opposition that (as had happened elsewhere) the meeting will be picketed, that pupils attending classes held at the same time will not pass the picket line, and that the demonstration with the attending noises will interfere



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with the regular conduct of school work.

The annotation in 161 ALR 1308 discusses "Constitutionality, construction, and application of statutes declaring that school buildings are civic centers, or otherwise providing for use of such buildings for other than school purposes."

Service of Process — *privilege of party or witness.* In the Oklahoma case of Harris Foundation v. District Court, 162 ALR 272, 163 P2d 976, Chief Justice Gibson wrote the opinion holding that a nonresident coming into the state for the purpose of attending court as a suitor or witness does not forfeit his immunity from the service of process by transacting business not connected with the matter involved in such court, or by being in counties other than that wherein the court session is held, so long as such business and absence are subordinate to such controlling purpose of attending court, and do not enlarge the time for coming and going.

The annotation in 162 ALR 280 discusses "Immunity of nonresident litigant or witness from service of process as affected by transactions or activities unrelated to action."

Stipulations — *relief from.* The Massachusetts Supreme Court in Malone v. Bianchi, 161 ALR 1158, 61 NE2d 1, opinion by Judge Spalding, held that while ordinarily parties are bound by their stipulations, the courts may, in order to accomplish justice, discharge stipulations improvidently made where, on suggestion of the trial judge, who had decided to direct a verdict for defendant, the parties stipulated that the question of damages only be submitted to the jury and that judgment might be rendered for the amount found in case the issue of liability should have been submitted to the jury, the trial judge may, where he believes the amount found by the jury is excessive, properly vacate the stipulation.

The annotation in 161 ALR 1161 discusses the broad question, "Relief from stipulations."

Trusts — *constructive service of process to establish.* Justice Jones, of the Supreme Court of Pennsylvania, in a very interesting and well-reasoned case, Alpern v. Coe, 352 Pa 208, 161 ALR 1046, 42 A2d 542, held that jurisdiction of a suit in equity to establish a constructive trust of lands within the territorial jurisdiction of the court may rest upon service of process out of the state on a nonresident, even though the relief sought may include a direction that defendant execute a conveyance of such lands, where, should defendant fail to comply with such direction, the court may cause the title to be transferred otherwise.

The annotation in 161 ALR 1051 discusses "Jurisdiction, upon constructive or extraterritorial service upon nonresident, of suit for establishment or enforcement of trust in respect of real property within the state."

Trusts — *limiting fees of trustee.* A very practical question was decided by the West Virginia Supreme Court of Appeals in Curl v. Security Trust Co., 161 ALR 855, 33 SE2d 677. Justice Kenna wrote the opinion holding that where an instrument creating an active trust fixes the amount to be paid to the trustee as annual compensation and the trustee accepts the office and performs the duties thereof, the trustee is entitled to no additional compensation upon final distribution, particularly where depletion and possible exhaustion of the corpus during the life of the trust were contemplated.

The annotation in 161 ALR 860 discusses, "Validity and effect of provision of contract or trust instrument limiting amount of fees of trustee."

Trusts — *trustee's right to purchase other stock for self.* Judge Phillips, of the U. S. Court of Appeals for the Tenth Circuit, wrote the opinion in Wootten v. Wootten, 161 ALR 1027, 151 F2d 147, holding that one holding in trust for others stock in a corporation which owned a ranch, and the stock of which was held in approximately equal amounts by the trusts, by the trustee individually, and by a third person, may be guilty of a breach of trust in purchasing for himself at a bargain price all of the stock of the third person, where he had sufficient trust funds in his hands to purchase a pro rata share for the trusts and the effect of the purchase was to give him, as an individual, a controlling interest.

Judge Huxman wrote a strong dissenting opinion.

The annotation in 161 ALR 1038, supplementing a previous annotation in 106 ALR 220, discusses "Ownership by trustee, executor, or guardian in his own right of stock in a corporation in which he also holds stock in his fiduciary capacity."

Wills — *partition as effecting a portion.* An interesting wills question decided in the case of Brady v. Paine, 391 Ill 596, 162 ALR 138, 63 NE2d 721, opinion by Judge Smith, holds that a devise of testator's undivided one-half interest in a tract of land is not adeemed by a subsequent exchange of deeds between the cotenants, whereby each became the sole owner of a specified part.

The author of the annotation in 162 ALR 146 presents the views of both the American and English cases on this point.

What Care Is Required of a Carrier by Air----

By GIBSON WITHERSPOON
President of Meridian (Miss.) Bar Association

Condensed from
The Mississippi Law Journal, March, 1946

SINCE the end of World War II the general public has become air-minded; so we know that air travel is destined to become more and more popular. There are at present many applications for feeder lines to be established and these small companies will spring up all over America. On these feeder lines and on the main commercial lines accidents will happen and liability will oftentimes be questionable.

First, we know that an aircraft carrier is not liable for either death or injuries sustained in an accident which is the result of an act of God. The question immediately presents itself: What is an act of God? The authorities are not in accord. It is sufficient for this discussion to point out that, generally, whether the injury was caused by an act of God or if the occurrence was an act of God is held to be a jury question under the usual rule. All the authorities are in accord that all human agencies must be excluded from the cause of the injury. Whether there was a mixture of human negligence with the act of God is a jury question.

A second rule operating to relieve the carrier by air from liability is the doctrine of the passenger's assumption of risk. It must first be shown that the relation of passenger and carrier existed, that the carrier was a common one whose conduct amounted to a public offer "to carry for all who tender him their goods or their person as he is accustomed to carry. . . ." With this relation established, the passenger assumes only usual and ordinary perils incident to air travel or this form of locomotion.

When the courts apply this rule to aviation accidents, it is plain that in some cases there must be a distinction in assumption of risk by the ordinary passenger, who could not have foreseen, for example, that a feeder line plane was not equipped with the proper receiving device

or that there was a defect in design or manufacture, while in the case of the passenger who was also an experienced pilot, and knew of the absence of such equipment and the dangers which often arise, the assumption of risk rule would apply.

Under the first exception discussed, the carrier is not liable for acts of God. The boundary between this doctrine and that of assumption of risk is not definitely defined. The passenger assumes not only the risks of acts of God, but also there is an assumption by him of such contingencies as inevitable accidents, sudden emergency, unforeseen events, and in some jurisdictions where there is such contributory negligence as would bar recovery.

Where violations of air commerce regulations are held to be evidence of negligence, it must be shown that such violation or omission was the cause, was a concurrent cause, or was closely linked with the proximate cause, to establish liability. The United States is a party to the Warsaw Convention relative to international transportation by air, which was signed at Warsaw in 1929, and ratified by the Senate on June 27, 1934; and in international air travel the carrier is charged with liability which differs greatly from our common law. The carrier under this law is liable unless he can prove either that he took all necessary steps to avoid the accident or that it was impossible to take such steps or measures under the existing circumstances.

The law imposes a duty on the commercial air carrier not only with respect to the operation of the plane but also as to its equipment, maintenance adjustments, pilots, and weather forecasts. The same duty is owed a passenger gratuitously carried. In determining the degree of care necessary, the equipment being employed at the time is of primary importance. Thus the degree of care of a small feeder line pilot with a small cabin plane would not be as high as for a trans-continen-

tal ship, which has all the safety instruments the human mind can conceive of, and two pilots to operate it. In every case the pilot or pilots must give the passengers explicit instructions regarding the safety belt. Usually the violation by a pilot of air-traffic rules, statutes, or of rules of the Department of Commerce is not of itself negligence, unless it is shown that such violation was the proximate cause of the accident.

Primarily the so-called rule of *res ipsa loquitur* is a rule of evidence. Some cases hold, for example, that it is applicable only where the relation of carrier and passenger is established, or where there is a contractual relationship between the parties. The weight of modern authority seems to be that the mere absence of such a relationship does not prevent the application of the rule and it is held to depend on the circumstances of the particular accident.

In one of the best-reasoned of the early cases, the court expressed itself in the following fashion: "'. . . in view of the very high degree of care essential under the law on the part of a carrier of persons . . . such a collision would not happen in the ordinary course of events if the carrier exercised such care, and . . . ordinarily when such an accident occurs, it is due to failure on the part of the pilot to use the proper degree of care in so operating it, or . . . to the manner in which defendant used or directed the instrumentality under its control.'"

It would seem that a plaintiff must, before filing his suit, make an election between a plea of *res ipsa loquitur*, and a plea setting out defendant's acts of negligence. Reliance on the latter course precludes invocation of the doctrine. Apparently a good test is to determine, if possible, whether at any given time a particular accident does or does not usually occur in the absence of negligence.

There is no doubt that the present status of the doctrine as applied to air accidents is a confused one. There is hope, however, that a measure of uniformity in the decisions may be achieved by Congress' enacting a statute which, of course, would be controlling in all interstate carrier accidents. There is now pending in Congress the so-called O'Hara Bill, which would provide for a rebuttable presumption of liability on the part of the common carrier by air for death or bodily injury to passengers being carried for hire. It is the theory of this proposal that it will supplant, in aviation accident cases, existing state decisions and statutes as to rules governing liability. Sixteen states and the District of Columbia have statutory limits in death cases; and since the O'Hara bill also sets a limit, the question of the constitutionality

of the proposed act immediately presents itself.

No doubt appropriate legislation will soon be enacted which will clarify considerably the existing confusion in the application of the doctrine of *res ipsa loquitur* to carriers by air.

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AN ENGLISH APPRAISAL OF THE

"*Annual Survey of American Law*"

By PERCY H. WINFIELD, *Professor of English Law, St. John's College, England, Barrister-at-Law and Honorary Bencher of the Inner Temple*

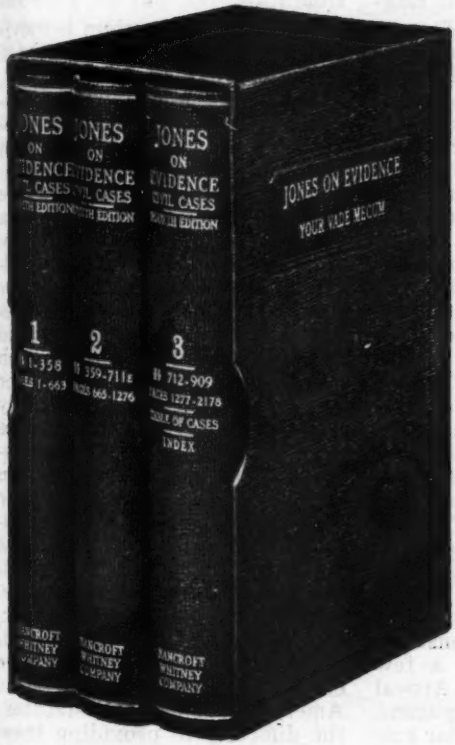
THE ENGLISH reviewer of these volumes hails their appearance with enthusiasm and gratitude equal to that which he has evinced in American reviews of them. It is gratifying to know that the series owes its inspiration to the *Annual Survey of English Law* published by the London School of Economics. We freely confess that the magnitude of the rash undertaking by Dean Arthur T. Vanderbilt and the Editorial Committee, of which Professor Alison Reppy is chairman, is far in excess of the work, heavy as it is, that is called for by the sister English publication. On our side of the Atlantic we have not to investigate the legislation and judicial decisions of over fifty jurisdictions. It is significant that in the volume for 1942 over 1900 cases figure in the Table of Cases. The range of topics dealt with cover every branch of the law and the inclusion of "International Law and Relations" under "Public Law" and of "Jurisprudence" at the end of each volume is very welcome. The introductory remarks at the beginning of each topic are useful sign-posts of the paths taken by the law during the year.

EDITOR'S NOTE: Annual Survey of American Law is a publication of the New York University Law School. Starting with the year 1942 the authors have prepared articles arranged under law school course classification commenting on the case and statutory law changes for the year.

Lawyers will especially appreciate the articles in the newer fields of the law, such as Administrative Law, Social Security and Welfare Co-operatives, Security Issues and Securities, Labor Law and Wages and Hours. The years 1942–1945 have now been covered. This review by a distinguished English scholar gives an appraisal of this work.

It is not our purpose to give detailed evaluation of each part of these volumes, for that would far exceed the reasonable bounds of space and, moreover, we should of necessity have to limit ourselves to a comparative study of the American and English systems in those branches of the law in which, rightly or

Jones on Evidence



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wrongly, we believe ourselves to be expert. What we are anxious to develop in this notice is the importance of the *Annual Survey of American Law* to English lawyers in particular.

In the course of the last half century the tendency of English lawyers to have recourse to American law for help and instruction has steadily increased. This applies not only to those who teach law or research in it but also to those who administer it judicially (at any rate in the higher courts), to the leading practitioners at the Bar and to those concerned with reform of the law. Of course there has always been an essential mutual interest in the United States and in England in the Common Law as the plinth upon which both systems have been built, and there is abundant evidence of that interest in Anglo-American legal literature; but during the half century that has been devoted by the present writer to the study of law, there is no doubt that the interest has intensified. It is notable that only a few months ago the Court of Appeal closely considered an argument of counsel that a particular rule laid down in the *Restatement of the Law of Torts* ought to be adopted by the Court for deciding the case before it. Again, it is common practice for the various committees for reform of the law, appointed by the Lord Chancellor in recent years, to embody in their reports the result of their examination of the American law relating to the subjects entrusted to their consideration.

The American system is inevitably more fertile in reported decisions than in English law, owing to the multiplicity of jurisdictions, the far greater population and territorial extent and the consequent greater variety of cases that come before the courts. Hence, many a point *primae impressionis* before an English court has already been decided in one or more of the United States courts. That fact alone would make it helpful for the English practitioner, teacher, researcher or law reformer to have ready access to literature that keeps him informed of the most recent important developments in American law. That is why he will feel so grateful for the *Annual Survey*. It may of course be urged that he ought to go direct to the American law reports and statutes, but unfortunately there are very few libraries in England that have complete collections of the American reports and statutes; the difficulty in providing them is mainly the limited amount of funds at the disposal of the libraries. Of course digests of cases are procurable but it is common knowledge that, useful as the digest of a case may be as a guide to the report of it, it cannot be safely relied on as a sub-

stitute for the report. Here is a gap that is admirably filled by the *Annual Survey*. It does not profess to be a digest, but as Dean Vanderbilt says in the Foreword to the 1942 volume, "it seeks simply to cut a path through the wilderness of single instances so that the lawyer and the intelligent layman may follow the development of the law, subject by subject." This aim, we feel, is fully achieved. The comments by highly qualified experts that accompany each topic are of the greatest value.

"There goes that breach of promise case out the window! Tom Smith and Mary Jones have just made up!"

Plowden—GREAT ELIZABETHAN REPORTER

By C. G. MORAN
of the Inner Temple, Banister-at-law

[Condensed from The Law Times, London, February 16, 1946]

By common consent Plowden was one of the best of the reporters of all ages. He called his volumes "commentaries," but makes it quite clear where he is commenting and where reporting. There is no headnote or sidenote, but each report is headed with the title of the case, the date, the nature of the action and the names of the parties. The commentaries were originally written in Norman French but were translated into English in the edition of 1779. We are told that Plowden spent three years in the study of arts, philosophy and physic at Cambridge and four at Oxford, where in November, 1552, he was admitted to practice surgery and physic. He began his legal studies in the Middle Temple at the age of twenty in 1539, that is, almost exactly at the end of the Year Book period. He became Serjeant-at-Law in 1558, died in 1584 and was buried in the Temple Church. His reports are contemporary, made by him after attendance in court. Winfield writes (Chief Sources): "To read the first case in Plowden after putting down the last volume of the black letter Year Books is to pace from a region of reporting where scarcely a single principle of its science seems to have been grasped to one where we appear to be much nearer the nineteenth century than the sixteenth."

Plowden tells us in the preface to his reports that he had accumulated a good volume of reports which he entered upon with a view only to his private instruction and when solicited by some of the judges and other learned men to allow his works to be made public, he declined, "being conscious of the simpleness of his understanding and of the small spark of reason with which he was endowed." But he said that later, having lent his book to intimate friends, their clerks and others by writing day and night had transcribed a great number of cases contrary to his own knowledge and intention and of those to whom he had lent the books. The copies thus made came into the hands of the printers and, though full of errors made by the copyists, Plowden heard that they were to be published. These facts, he said, induced

him to publish his own work, the first volume in 1571 and the two volumes in 1578.

As an example of Plowden's Commentaries, the reader may consult his report of *Hales* v. *Petit* which it has been suggested was the origin of a part of the grave diggers' dialogue in Hamlet. The date of the case was 1562 and the first publication of Plowden was in 1571. The date suggested for the first production of the play in the Encyclopædia Britannica is 1600-1. The first quarto edition of the play was published in 1603. Sir James Hales at the age of eighty-five was crossing a water-course near his home at Canterbury by a narrow bridge from which he fell and was drowned. The coroner sitting with his jury presented that Sir James voluntarily entered the river "and himself therein feloniously and voluntarily drowned."

Here is the dialogue:

"*First Clown:* It must be se offendendo: it cannot be else; for here lies the point; if I drown myself wittingly, it argues an act; and an act hath three branches; it is to act, to do and to perform: argal she drownded herself wittingly.

Second Clown: Nay, but hear you, good man delver,—

First Clown: Give me leave. Here lies the water: good: here stands the man; good; if the man go to this water and drown himself, it is, will he, nill he, he goes—mark you that; but if the water come to him and drown him, he drowns not himself; argal, he that is not guilty of his own death, shortens not his own life.

Second Clown: But is this law?

First Clown: Ay, marry is't; crowner's quest law."

The Crown seized a lease granted to the late Sir James and his wife as joint tenants as being forfeited on the ground of his suicide and granted it to Cyriack Petit who sought to enter. Lady Hales brought an action of trespass against Petit. It was admitted that if Sir James had committed felony in his lifetime the lease was forfeited. But had he committed felony *in his lifetime?* That was the question. Six serjeants-at-law argued the case; Wallace in his book The Reporters (1882) summarises the argument in Plowden's Commentaries for Lady Hales as follows: "A man could not be *felo de se* until the death of himself be fully had and consummate. The death must precede the felony and *a fortiori*, the forfeiture, which was its consequence. Here, admitting that the cause of his death—the throwing himself into the water—was done in his lifetime, and so completed, still, the death was a thing subsequent, and not complete in his

lifetime. When he was dead he was not alive. The death was not to have relation to the cause of it, as was shown by a position assumed as admitted, that if A. gave B, a mortal stab, of which B. died only some time after, A. might give away his goods to C., after the stab, and before the death, and the gift would be good; and by a case cited from 11 Hen. IV, where two constables had voluntarily let a man escape that had given a wound to another, who afterwards died of it; yet it was not felony in the constables, 'for the death hath no relation to the cause of it, nor was he that gave the wound a felon before the party died.' Although the forfeiture comes at the same instant that he dies, yet in things of an instant there is a priority of time in consideration of law, and the one shall be said to precede the other, although both shall be said to happen at one instant, for every instant contains the end of one time and the commencement of another. And, accordingly, here, the death and the forfeiture shall come together, and at one same time, and yet there is a priority, that is, the end of his life makes the commencement of the forfeiture, though at the same time, the forfeiture is so near to the death, that there is no mean time between them, yet notwithstanding that, in consideration of law, the one precedes the other, but by no means has the forfeiture relation to any time in his life." Walsh for the defendant said that the act consists of three parts: "The first is the imagination which is a reflection or meditation of the mind, whether or no it is convenient for him to destroy himself and what way it can be done. The second is the resolution which is a determination of the mind to destroy himself, and to do it in this or that particular way. The third is the perfection, which is the execution of what the mind has resolved to do. And this perfection consists of two parts: *viz.* the beginning and the end. The beginning is the doing of the act which causes the death and the end is the death, which is only a sequel to the act."

Sir Anthony Browne, one of three judges, dealt with the main point. He said: "Sir James Hales was dead; and how came he to his death? It may be answered by drowning. And who drowned him? Sir James Hales. And when did he drown him? In his life-time. So that Sir James Hales, being alive caused Sir James Hales to die; and the act of living man was the death of the dead man. And then for this offence it is reasonable to punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive, when the punishment comes after his death? Sir, this can be done no other way, but by di-

vesting out of him, from the time of the act done in his life, which was the cause of his death, the title and property of those things which he had in his life-time." It was held that the plea of the defendant was sufficient in law to preclude the plaintiff from having her action. Wallace adds that evidence is still preserved which would indicate that Sir James accidentally fell and drowned. So, before the passing of 33 & 34 Vict., c 23, the goods or chattels of a *felo de se* were, upon the finding of the inquisition, forfeited to the Crown.

"Show Judge Puffle to Pup-Tent 34, which he will share with a Mr. Dow and a Mr. Holly!"

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The Rushcliffe Report

By ALEX ELSON
Member of the Illinois Bar

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IT is part of the American creed that every person, regardless of economic status, religious belief, race, or color, is equal before the law and equally entitled to the protection of the law. Lawyers take great pride in this belief. In the complicated structure we call law it goes without saying that equal protection of the law must assume an equal opportunity to receive the advice and guidance of the expert in the law, the lawyer, and an equal opportunity to enter the halls of justice without danger of eviction for want of cash to pay court costs, out-of-pocket expenses, and living expenses while the judicial process unfolds. That we fall short of our cherished beliefs will be generally conceded by most of the bar. Our blindness to he realities of the situation cannot rationally be reconciled with established inventories of the situation. Each year statistics are published on the extent of legal aid work in the United States. These reports are generally ignored although they show year after year that more than 100,000,000 Americans do not have access to any form of organized legal aid.

In England, while buzz bombs were wreaking terrific havoc, while the civilian was silently suffering extreme deprivation of physical wants, a committee of outstanding members of the English bar and leaders in social reform sat down to examine realistically and without flinching the gap between the bar's preachments and its practices. After numerous meetings and considerable investigation, the Rushcliffe Committee made its report in May, 1945, to the Lord High Chancellor and to the Parliament.

For the most part, legal assistance in England has been given by private organizations or gratuitously by members of the legal profession or by minor officials of the courts or by trade unions. The only extensive type of legal assistance financed by the state has been payment of assigned counsel in criminal cases and provision for legal aid for members of the armed forces. With reference to existing methods of giving legal aid, the committee concludes:

> . . . it would be impossible to expect any extension of gratuitous professional services, particularly as there appears to be a consensus of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance. . . . It follows that a service which was at best somewhat patchy has become totally inadequate and that this condition will become worse. If all members of the community are to secure the legal assistance they require, barristers and solicitors cannot be expected in future to provide that assistance to a considerable section as a voluntary service.

The principal recommendations of the committee for legal aid, which it defines as assistance in conducting or defending proceedings in court including court fees, witnesses, and other expenses, are summarized as follows: (1) Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require. (2) This provision should not be limited to those who are normally classed as poor but should include a wider income group. (3) Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay something toward costs. (4) The cost of the scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities. (5) The legal profession should be responsible for the administration of the scheme, except that part of it dealt with under the Poor Prisoners' Defence Act (Poor Prisoners' Defence Act provides for the assignment of solicitor and counsel by the court and compensation for such solicitor and counsel). (6) Barristers and solicitors should receive adequate remuneration for their services. (7) The Law Society should be requested to frame a scheme on the lines outlined in the detailed recommendations providing for the establishment of Legal Aid Centres in appropriate towns and cities throughout the country. (8) The Law Society should be answerable to the Lord Chancellor for the administration of the scheme, and a central Advisory Committee should be appointed to advise him on matters of general policy. (9) The term "poor person" should be discarded and the term "assisted person" adopted.

The committee's recommendation with reference to legal advice, which it defines as advice on legal matters, drafting of simple documents, and negotiations apart from litigation, but not including conveyancing or probate matters or the drafting of wills, is stated as follows:

> All applicants for legal advice should be given legal advice on payment of a fee of 2s. 6d. subject to the following:

(1) this fee may be remitted in suitable cases;

(2) where it is apparent that the applicant is able to pay the costs of getting the advice in the ordinary way, legal advice may be refused.

In cases of emergency, a person needing legal advice should be able to apply to the Secretary of a Local Committee who might either deal with the matter himself or if he thinks it a proper case, refer it to a solicitor upon the advice panel. The person seeking advice should then attend that solicitor, who would advise him and would be paid a fee of 7s. 6d. from the funds of the Area Committee.

Each Area Committee at its Headquarters should have an office open during all reasonable hours for the purpose of giving advice. In addition, in each centre of population in its Area, where a whole time office can be justified, the Area Committee should set up a branch office for legal advice.

Whole time paid solicitors would be employed in these offices for this purpose. In centres of lesser population, the Area Committee would organize advice sessions on regular days and would arrange (through Local Committees) for a solicitor to sit there during the advertised hours and such solicitor would be paid a fee of so much per session.

The committtee recommends that the entire cost of the plan for giving legal aid and legal advice should be borne by the government and estimates that the cost of the administration of the scheme will be slightly under £200,000 per annum. The plan proposed by the committee contemplates that the Law Society will submit an estimate to the Lord Chancellor's Department of the amount required throughout the whole of England and Wales. The Lord Chancellor will then make a payment in a lump sum to the Law Society, and the Law Society will allocate that money to various area committees according to their needs.

What is most provocative about the report and what stands out as a challenge to this country are the four changes fundamental if the ideal of equality before the law is to be made a reality.

1. Legal aid is not a charity stemming out of private philanthropy but is a right which the state has a duty to foster and protect. In this respect the report would even change terminology and discard such terms as "poor person" and "pauper."

2. There is an obligation to establish a nationwide system for giving legal advice and for providing legal representation in all courts, the cost to be borne by the state.

3. The relationship of attorney and client should be maintained even though there is state assistance with all the protection surrounding the relationship and the professional obligations that go with it. This is assured through administration of the plan by the organized bar.

4. The obligation to provide assistance is not limited to the lowest income group but includes persons who would not ordinarily under existing means tests be eligible for assistance.